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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 234

THE UNITED STATES OF AMERICA EX REL. CHICAGO Great Western Railroad Company and the Kansas City Southern Railway Company, petitioners

v.

INTERSTATE COMMERCE COMMISSION, ET AL., respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

INTRODUCTORY STATEMENT

Petitioners herein seek to have this Court review a decision of the United States Court of Appeals for the District of Columbia, dated May 7, 1934 (71 Fed. (2d) 336) (R. 245), affirming a judgment of the Supreme Court of the District (R. 239) dismissing the petition of Chicago Great Western Railroad Company and The Kansas City Southern Railway Company for a writ of mandamus to com-

pel the Interstate Commerce Commission to vacate its order dismissing, and to forthwith consider and pass upon the merits of, petitions filed by said carriers, whereby they sought to be relieved of certain obligations voluntarily assumed in relation to the maintenance and use of the Kansas City Terminal at Kansas City, Missouri, and Kansas City, Kansas.

OPINIONS BELOW

No opinion was rendered by the Supreme Court of the District. The decision of the Court of Appeals appears at R. 245–257, and is reported in 71 F. (2d) 366 et seq. The report of the Interstate Commerce Commission appears at R. 94–134, and is reported in 104 I.C.C. 203.

JURISDICTION

The judgment of the Supreme Court of the District was entered June 23, 1933 (R. 239); petitioners noted an appeal in open court on the same day (R. 239); on May 7, 1934, the Court of Appeals (R. 245) affirmed the action of the lower court, and within 90 days, (on July 28, 1934) petition for writ of certiorari was filed in this Court.

QUESTIONS PRESENTED

1. Whether the Commission's action dismissing the petitioners' intervening petitions was a decision on the merits or a denial of its jurisdiction.

2. Whether the court may review a determination of the Commission made in the exercise of

judgment and discretion in a matter committed to the latter and substitute the court's judgment for that tribunal's.

3. Whether the Commission's decision and order were reasonable and not arbitrary.

STATUTES INVOLVED

The pertinent provisions of the applicable law, the Interstate Commerce Act, U.S. Code, Title 49, c. 1, are set forth in the appendix, *infra,* pages 51 to 55.

STATEMENT OF THE CASE

Proceedings before the Commission

The proceeding before the Commission, known as Docket No. 15682, *Missouri-Kansas-Texas Railroad Company* v. *Kansas City Terminal Railway Company,* 104 I.C.C. 203, presented a situation which arose out of the construction of the Kansas City Union Station and other terminal facilities in Kansas City, Missouri, and Kansas City, Kansas.

Prior to 1906, ten railroads serving Kansas City had used the so-called union depot. The two petitioners here had used the Kansas City Southern's station, the Chicago Great Western being a tenant. The union depot was inadequate and there was a public demand for better facilities. As a result, in 1906, the ten lines organized the Kansas City Terminal Railway Company as a common carrier railroad with an authorized capitalization of 30 million, later increased to 50 million, dol-

lars. Its directorate is composed of a representative of each of the proprietary lines. (R. 99, 104 I.C.C. 208.)

On June 12, 1909, an agreement was entered into by and between the Kansas City Terminal Railway Company, the ten lines, and the Illinois Trust and Savings Bank, as trustee. This agreement was supplemented January 24, 1910, by the inclusion of petitioners, Kansas City Southern and the Chicago Great Western, on equal terms with the original proprietary lines. These two agreements are known as the operating agreement. (Petitioner's Ex. No. 1, R. 16–83; R. 100, 104 I.C.C. 209.)

The operating agreement, the term of which is 200 years, is a mutual engagement covering the construction, maintenance, operation, use and management of the terminals, switching and other services to be rendered the proprietaries. It may be modified only with the assent of the Terminal Company and each of the proprietary companies and the additional assent of the trustee. (R. 107, 104 I.C.C. 215.)

It provides that one-twelfth of the interest accruing on the Terminal Company's outstanding bonds of $50,000,000, and of the taxes and other governmental charges payable by the Terminal Company, and at maturity one-twelfth of the principal of the bonds, shall be assumed and paid over by each of the proprietaries. Maintenance and operating expenses, including overhead and other general outlays, are accounted for and assessed

against each line, by zones used and by calendar months, in the proportion which its use bears to the total use by it and the other lines of the respective zones. Switching services performed by the Terminal Company are at tariff rates, and such special services as are performed by it, at approximately cost. Net revenues derived by the Terminal Company from concessions, or other uses of the terminal facilities or property are credited monthly to the carriers not in default and in the respective proportions of their contributions.

There are further provisions that termination or suspension of any of the rights of a constituent carrier shall not affect the obligation to make the payments required, and others relating to action in case of default, etc. (R. 107, 108, 104 I.C.C. 215, 216.)

Coincident with the execution of the operating agreement a stock-trust agreement was executed between the Terminal Company and the ten, now twelve, proprietary lines, and the Pioneer Trust Company of Kansas City. It provided for transfer of the shares of the Terminal Company's stock and of such further shares as should be offered to and subscribed for by those lines from time to time to the trust company, in trust for the purpose of carrying out the provisions of the operating agreement and as security for their performance, with provisions against acquisitions of such stock by outside interests (R. 100, 104 I.C.C. 209).

The work of construction and unification of the passenger and freight terminals in accordance with plans ultimately adopted was prosecuted and resulted in the opening for business of the new union passenger station November 1, 1914, and the making ready for use and operation the joint terminal facilities. (R. 100, 104 I.C.C. 209.) While the outlay contemplated when the project was initiated was $25,000,000, the ultimate cost was practically twice that amount. (R. 109, 110, 104 I.C.C. 217.)

The Missouri, Kansas & Texas *Railway* Company, one of the proprietary companies, party to the agreements just described, went into receivership and most of its railway lines were purchased at a judicial sale by the Missouri-Kansas-Texas *Railroad* Company. Pursuant to order of the receivership court, the purchaser was given the privilege of electing as to whether it would or would not become one of the proprietary companies as its predecessor had been. It elected not to do so and initiated the proceeding before the Commission by filing on March 10, 1924, a petition whereby was sought of the Commission an order under the authority of paragraph (4) of Section 3 of the Interstate Commerce Act, according to petitioner the right to use designated portions of the union passenger station and the freight terminals of the Kansas City Terminal Railway Company, at Kansas City, Missouri-Kansas. It alleged that the terms imposed upon petitioner for its use of the terminals were unjust, inequitable

and burdensome in that by the operating agreement each of the proprietary lines parties to said agreement is required to pay one-twelfth of the interest and of the taxes, without regard to the extent of the use of the terminal by each such company; that as a small user of the terminal facilities, its payment for interest and taxes is out of proportion to its use. (R. 95, 104 I.C.C. 204.)

All the other users of the terminal filed petitions in intervention. Five of these, known as the larger users, opposed the relief sought; the others, small users, in which group petitioners belong, sought the same relief that the Missouri-Kansas-Texas sought, and also urged that to grant the relief to the Missouri-Kansas-Texas alone would aggravate the situation and unlawfully discriminate against the other users. (Exs. 3 and 4, R. 85–93, also R. 97, 98, 104 I.C.C. 206, 207.)

Hearings were had upon the issues raised by the petitioner, respondent and the interveners. A large volume of testimony was taken and the case was orally argued before the Commission and submitted for determination. Thereafter, the Commission made and issued its report and order, dated November 10, 1925 (Petition, Ex. No. 5, R. 94–135), wherein, after a very full statement of the facts, of which the foregoing is a partial summary, and after setting forth the respective contentions of the parties, including the interveners, it took up con-

sideration of the applicability to the case made of paragraph (4) of Section 3 of the Interstate Commerce Act, upon which the Missouri-Kansas-Texas Railroad Company, and the other small users, including the petitioners here, based their right to relief at its hands.

That paragraph, (4), of Section 3 in brief authorizes the Commission, if found to be in the public interest and not prejudicial to the owning carrier of terminal facilities, to require the use of the terminal by another carrier or other carriers, on terms to be agreed upon between the parties, and, in case of failure to agree, the Commission is authorized to fix a just compensation on principles controlling condemnation proceedings. If the owning carrier is then not satisfied, it is given the right to sue in court for damages sustained because of its compliance with the order or for just compensation for the use, or both.

Concerning this statute and its applicability to the situation presented, the Commission said (R. 113, 104 I.C.C. at 221):

> This paragraph was added to section 3 by the transportation act, 1920, and superseded a limitation upon the requirement of the section that all common carriers subject to the act afford all possible facilities for interchange of traffic between their lines, and for receiving, forwarding, and delivering passengers and property, without discrimination, that this should "not be construed as requiring any such common carrier to

give the use of its tracks or terminal facilities to another carrier engaged in like business."

Controverting respondent's challenge of our power or authority to grant any such relief, the interveners contend that we have power under existing law to relieve them of the obligations imposed by the operating agreement. The contention is not, however, founded upon an analysis of the above-quoted paragraph; nor is any other provision pointed out as in terms conferring upon us any such power to revise a voluntary contract between carriers for the financial support of a joint terminal, not itself in violation of any provision of the act, as we are expressly given by Section 15 (6) to revise divisions of joint rates, subjects of prior agreements between carriers, considered and sustained in *New England Divisions Case,* 261 U.S. 184. The contention rests in part upon judicial decisions recognizing the paramount authority of Congress in the regulation of interstate and foreign commerce, and in certain of them upholding direct exertions of its supreme authority or exercises of the authority committed to us as against existing contracts or conflicting exercises of a State's police power. * * *.

After brief reference to the cases cited in support of the small users' position and the counter contention that what was asked was the reformation of a contract, a power vested exclusively in

courts of equity, the report continued (R. 114, 115, Rept., pp. 222, 223):

> * * * Other considerations enter into a contract which is impressed with a public interest, whether a contract between carriers or between them and a State or municipality, the provisions of which encroach upon the latent or exerted authority of Congress under the commerce clause of the Constitution. The underlying principle considered, no such contract can be placed beyond the reach of a competent exercise of such authority merely by the inclusion therein or the relation thereto of outside interests not themselves subject to the act, however cautiously the power should be exercised in such cases. Nor does the fact that franchise grants are among the mutual covenants make it immune, as was settled in *New York* v. *United States, supra,* where in the interest of interstate commerce we had exercised a supervening authority expressly granted to us. * * *
>
> The paragraph above quoted empowers us, when found to be in the public interest and practicable, without impairing the ability of a carrier "owning or entitled to the enjoyment of terminal facilities" to handle its own business, to require the use of the facilities by "another carrier" or "other carriers" upon terms and for compensation to be agreed upon or to be fixed as provided. The primary power to be exercised is to "require the use" of the terminals, which

power the further power to fix the compensation in appropriate circumstances merely supplements. The requirement is to be laid upon a carrier then "owning or entitled to the enjoyment" of the facilities and for the benefit of "another carrier" or "other carriers"; in other words, to be laid upon a carrier owning or by lease or otherwise entitled to present enjoyment and for the benefit of a carrier or carriers not so owning or entitled.

Obviously, the interveners are not in the latter situation. They have been and are in all respects entitled to the past, present, and future enjoyment of the terminals in question, and have enjoyed and now enjoy them in their own right as virtual coproprietors. They and the other proprietary lines have the equitable title to the property and franchises in undivided equal shares, and through their corporate instrument, the respondent, the facilities are controlled and operated. Not only so, those interveners, equally with the other proprietaries, have been and still are parties to the operating agreement, and to accord them the desired relief would necessarily involve to that extent what would amount to a revision or reformation of that agreement. They do not seek an abrogation of the entire agreement as wholly invalid and not to be binding upon them in any part, but merely, however stated, that certain of its provisions be in effect rewritten. A contention by the Alton

> that it would not in terms require a revision of the agreement, but merely a revision of the charges now imposed upon that line, would seem to express a distinction without a difference. Manifestly, the charges could be revised only by a virtual revision, through a superseding order, of those provisions of the agreement in accordance with which the charges are imposed. The power and authority thus invoked are not conferred by the quoted paragraph.

The report then took up the question of the applicability of Section 15a of the Act, insofar as it provides that the Commission shall initiate, modify or adjust reasonable rates so that the carriers as a whole or in groups will under honest, efficient, and economical management earn a net railway operating income equal to a fair return on the aggregate value of their railway property used in transportation service.[1] Answering a contention that under that provision the Commission need only find that the operating agreement is so burdensome as to result in inefficient management, to cause misapplication by the railways involved of funds created for an entirely different purpose, and generally to impair their ability to furnish adequate service, it was said (R. 116, Rept. p. 224):

> * * * However desirable it might be in particular instances, we are unable to spell

[1] Section 15a (2) was amended by Transportation Act, 1933. Both the old and new paragraphs are set out in the appendix.

> out from that provision such a jurisdiction. What the provision requires or authorizes us to do is to fix remunerative reasonable rates in circumstances which embrace honest, efficient and economical management as a condition or limitation. We should have the information in that respect which will aid an effective exercise of our duty and authority, but we are not commanded to insure or empowered to enforce such management, responsibility for which at all times rests upon the carriers. Neither expressly nor by implication does the provision embrace a direct or indirect revision or reformation of any such contract, lawful in itself as far as appears, as that here in question; and we are unable to find the requisite power or authority in any other provision of the act.

It then passed upon the asserted violation caused by the agreement of paragraphs (1) and (3) of Section 3 of the Act and said (R. 116, Rept. p. 224):

> Paragraphs (1) and (3) of section 3 are put forward as vitiating the operating agreement in so far as it provides for the equal division of interest and taxes. Paragraph (1) prohibits any undue prejudice or preference as between particular persons, companies, firms, corporations, or localities, or particular descriptions of traffic, in any respect whatsoever, chargeable to any common carrier or carriers subject to the act. Paragraph (3) commands the maintenance of appropriate facilities

for the interchange of traffic between carriers, and for the receipt, forwarding, and delivery of passengers and property, without discriminations in rates, fares, and charges or in the distribution of unrouted traffic between their connections. Assuming, without now deciding, that the provisions of paragraph (1) are broad enough to embrace, as between the parties thereto, a joint terminal agreement into which all the lines have voluntarily entered and for which they are mutually responsible, the distribution of the charges here in question is not shown to fall within their condemnation. Those charges are distinctly capital charges, based upon the terminal property itself, not upon its use, in no sense assumed by or chargeable to the proprietary lines as compensation for uses they either do or may make, and are divided among the lines in the proportions of their equitable titles to or interests in the property. For their respective uses of the property the lines severally assume maintenance and operating expenses in corresponding proportions. This is not shown to be undue prejudice or preference or unjust discrimination. Each proprietary pays an equal share of the aggregate interest and taxes upon its equal share in the aggregate property. Also, as essentially capital charges, they have no relation, direct or indirect, to the interchange of traffic between the several lines within the contemplation of paragraph (3).

The conclusion, so far as petitioners are concerned, was (R. 117, Rept. p. 225):

> An order will be entered dismissing the intervening petitions of the Kansas City Southern, Frisco, Great Western, Wabash, Milwaukee, and Alton.

Such an order was entered on November 10, 1925. (R. 135).

The case upon the petition of the Missouri-Kansas-Texas was continued pending the outcome of litigation testing the question of whether it was bound by the terms of the operating agreement.[2] This was subsequently decided in favor of the Missouri-Kansas-Texas' contention that it was not so bound and thereafter the case was heard by the Commission June 1, 1933, on the question of just and reasonable compensation for its use of the terminal, the Commission having held that as to that railroad it had jurisdiction under Section 3 (4) provided it was not bound by the agreement.

In 1931, the petitioners filed petitions for a rehearing of the Commission's order dismissing their petitions in intervention but these were denied by the Commission on June 1, 1931. (Petition, par. (13), R. 10.)

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[2] Pending final disposition of the proceedings, the Commission issued an emergency order pursuant to paragraph (15) of Section 1 of the Act, permitting the Missouri-Kansas-Texas to use the terminals, under the terms of the operating agreement; payments thereunder not to be the final measure of compensation (R. 95).

Proceedings in Court

The petition for mandamus filed in the Supreme Court of the District on May 31, 1933, is cast on the theory that the action of the Commission in dismissing petitioners' intervening petitions was erroneous in law and constituted a denial of a jurisdiction conferred upon it by the Interstate Commerce Act; that in refusing to exercise this asserted jurisdiction, the Commission acted arbitrarily and contrary to law and denied to petitioners their lawful rights. (Petition, pars. (16), (17), (18), R. 13.)

Petitions to intervene as parties respondent were filed by the Atchison, Topeka & Santa Fe Railway Company, The Chicago, Rock Island & Pacific Railway Company, Union Pacific Railroad Company, Chicago, Burlington & Quincy Railroad Company and the Kansas City Terminal Railway Company (R. 208; 227); they were allowed (R. 209, 210, 229) and their answers were filed (R. 210, 229). At the hearing the Missouri Pacific Railroad Company was admitted as a party to the intervention filed on behalf of the Santa Fe and others. (R. 240.)

The case was heard upon the petition, answer of the Commission, the answers of the interveners, and petitioners' demurrer to said answers. The Court overruled the demurrer, and the petitioners electing to stand upon their demurrer, judgment was entered dismissing the petition (R. 239). An appeal was noted, (R. 239) and, on May 7, 1934, the

Court of Appeals of the District affirmed the judgment of the lower court. (R. 245.)

SUMMARY OF THE ARGUMENT

1. Under the issues raised in the proceeding before the Commission there devolved upon it the interpretation of the applicable provisions of the Interstate Commerce Act in the light of the facts adduced at the hearing. That the Commission entertained the intervening petitions of petitioners and others, proceeded to hear the evidence, considered the facts and applied the law to the facts is manifest from its report. The denial of the relief sought was just as much an exercise of jurisdiction as the awarding of the relief would have been. Jurisdiction is the power to decide and does not depend upon a correct decision. *Fauntleroy* v. *Lum,* 210 U.S. 230, 235; *Binderup* v. *Pathe Exchange,* 263 U.S. 291, 305–306. So even if the Commission's action were erroneous, that error arose from an exercise, not a denial, of jurisdiction. *General Investment Co.* v. *N. Y. Cent. R.R.,* 271 U.S. 228, 230–231; *Butte, Anaconda & Pac. Ry. Co.* v. *United States,* 290 U.S. 127.

2. To decide the matter presented, the Commission was called upon to construe the statutes involved. The discharge of that duty involved the exercise of judgment and discretion. *Hall* v. *Payne,* 254 U.S. 343. It is well settled that the decision of an executive officer or of a tribunal, made in the discharge of a duty imposed by law and involv-

ing the exercise of judgment and discretion, may not be reviewed by mandamus. That writ may not be used to coerce the judgment and discretion of such an officer or tribunal or as a substitute for a writ of error. *Ness* v. *Fisher,* 223 U.S. 683, and cases cited, page 692; *Knight* v. *Lane,* 228 U.S. 6, 13; *Alaska Smokeless Coal Co.* v. *Lane,* 250 U.S. 549; *I.C.C.* v. *Waste Merchants Ass'n.,* 260 U.S. 32; *Work* v. *Rives,* 267 U.S. 175, 183; *I.C.C.* v. *Campbell,* 289 U.S. 385, 393, 394. If the action of the Commission was arbitrary or unreasonable, a case for mandamus might arise. But we think that the least that could be said of the Commission's conclusions and order is that they were not arbitrary or unreasonable and that the construction and application of the statutes were permissible. This being so, there is no warrant or occasion for the issuance of this extraordinary writ.

3. The Commission's construction of the statutes involved was not only reasonable and not arbitrary, but on the contrary correct. The statutes involved and relied upon by petitioners in the proceeding before the Commission clearly do not cover or apply to the case made.

ARGUMENT

I

The Commission took jurisdiction of the case, considered and determined it on the merits

The Commission's report shows a painstaking and thorough study and consideration of all the fac-

tors in the case. It goes fully into all the pertinent facts, discusses the status and situation of the petitioners and the other parties to the proceeding, details the conditions which gave rise to the proposition for the new union station and the facilities connected therewith, the plan which was adopted to consummate the project, the various agreements voluntarily entered into by the railroads to insure the project, and takes up the various contentions and views of the interested parties.

The conclusion of the Commission was that a case warranting relief under the applicable law had not been made out by the intervening small users. Hence, these petitions were dismissed.

This action was predicated upon the holding (1) that the small users did not come within the purview of paragraph (4) of Section 3 of the Interstate Commerce Act, which empowers the Commission under certain conditions to compel a carrier to allow the use of its terminal facilities to another carrier, since they were already using the terminal facilities under voluntary agreements while the statute contemplated a case where use is not had but is desired and compulsion is necessary to force the unwilling terminal owner to allow use, (Report, R. 114, 115, 104 I.C.C. 222, 223); (2) that section 15a of the Act, which provides that the Commission shall initiate, establish or adjust rates so that the carriers of the country as a whole or by groups, shall earn a fair return, did not apply to a case

such as presented or authorize the Commission to revise or reform a contract such as that involved in the case before it, (Report, R. 115, 116, 104 I.C.C. at pp. 223, 224); (3) that there was no showing of a violation of paragraph (1) of Section 3 which prohibits any undue prejudice or preference, caused by the distribution of the charges provided for in the operating agreement, because those charges are capital charges, not based upon the use of the terminal property, (Report, R. 116, 104 I.C.C., at p. 224); and (4) that there was no showing of a violation of paragraph (3) of Section 3 which requires affording of equal facilities for interchange of traffic, etc., without discrimination, because the charges provided for in the operating agreement and from which relief was sought were essentially capital charges and have no relation, direct or indirect, to the interchange of traffic, (Report, R. 116, 104 I.C.C. at p. 224).

In the light of the report and the conclusions reached, it seems plain enough that the Commission took jurisdiction of the case and decided it upon the merits. To assert that jurisdiction was denied is merely to confuse terms. Whether the petitioners here and the other parties to the proceeding had made a case entitling them to relief under these provisions of the applicable law, was the very thing which by their intervening petitions had been submitted for adjudication, and which they thereby conceded was a matter committed to the Com-

mission. That the Commission denied relief is not equivalent to denying jurisdiction. It was as much an exercise of jurisdiction when the Commission made its decision that the facts did not make a case warranting relief and dismissed the intervening petitions as it would have been had the Commission awarded the relief sought. Even if it had committed an error by misconstruction of the applicable law, it did not transcend its jurisdiction because jurisdiction does not depend upon a correct decision. The distinction between jurisdiction and merits is plain. One goes to the power, the other only to the duty of the court. *Fauntleroy* v. *Lum,* 210 U.S. 230, 235. Jurisdiction cannot be made to stand or fall upon the way the court may chance to decide an issue. *Binderup* v. *Pathe Exchange,* 263 U.S. 291, 305, 306. By jurisdiction is meant the power to entertain a case, consider the merits and render a binding decision; by merits is meant the various elements which enter into or qualify the right to the relief sought. There may be jurisdiction and yet an absence of merits. *General Investment Co.* v. *N.Y. Central R.R.,* 271 U.S. 228, 230, 231.

The recent decision in *Butte, Anaconda & Pacific Ry. Co.* v. *United States,* 290 U.S. 127, is precisely in point on this phase of the case. There the United States sued the railroad company to recover money paid to it under a certificate issued by the Commission under Section 204 of the Transportation Act

1920, which provided for payment to a carrier engaged in general transportation which had been operated under its own management during the period of Federal control and which had sustained a deficit in operating income as defined in that section. It was asserted that the certificate had been issued under an erroneous construction by the Commission, later changed, of the meaning of "deficit", as used in the statute, and hence that the Commission had no authority to issue the certificate or the officials of the Treasury to make payment to the railway company.

Speaking of that contention the Court said it had no occasion to determine which one of the Commission's interpretations of the word "deficit" was the correct one, because it was of opinion that the Government could not recover, even if the Commission had erred. It then said (p. 136):

> The decision was on the merits. The case is no different than it would have been, if the Commission had erred in any other ruling on a matter of law; or in a finding strictly of fact; or in some finding as to maintenance, depreciation or value—determinations called findings of fact but which rest largely in opinion. In making those decisions the Commission would necessarily act in a *quasi*-judicial capacity. If it misconstrued the term "deficit", it committed an error; but it did not transcend its jurisdiction. * * *

Then, after referring to numerous questions which the Commission would have to determine in inter-

preting the provisions of Section 204, the Court said (p. 141):

> While Sec. 204 granted a bounty, it conferred a right, and constituted the Commission a *quasi*-judicial tribunal to adjudicate claims thereunder. Thus it was called upon to pronounce a formal judgment on rights asserted. A decision adverse to the carrier on any one of the suggested questions of construction might compel dismissal of the claim; thus relieving the Commission of the necessity of enquiring whether a deficit had been suffered. But it does not follow that such a decision would determine an issue of jurisdiction. Under this legislation, whether a claimant seeking "relief has the requisite standing is a question going to the merits and its determination is an exercise of jurisdiction." Compare *General Investment Co.* v. *New York Central R.R.*, 271 U.S. 228, 230. * * *.

The analogy between the cited case and the case at bar is clear.

In the recent decision of *Miguel* v. *McCarl*, 291 U.S. 442, 451, this Court said:

> The principal question upon which the case turns, and the only one we need consider, is whether the statutes involved so plainly require the payment of the voucher that such payment constitutes a mere ministerial act on the part of the disbursing officer. Following numerous cases theretofore decided, the applicable rule in respect of the writ of mandamus is stated in *Wilbur*

v. *United States*, 281 U.S. 206, 218–219, as follows:

"Mandamus is employed to compel the performance, when refused, of a ministerial duty, this being its chief use. It also is employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way nor to direct the retraction or reversal of action already taken in the exercise of either.

"The duties of executive officers, such as the Secretary of the Interior, usually are connected with the administration of statutes which must be read and in a sense construed to ascertain what is required. But it does not follow that these administrative duties all involve judgment or discretion of the character intended by the rule just stated. Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there be provision or implication to the contrary. But where the duty is not thus plainly prescribed but depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus."

In the mandamus case of *Interstate Commerce Commission* v. *New York, New Haven & Hartford*

R. Co., 287 U.S. 178, 203, the Court pointed out that the duty there sought to be compelled by mandamus, "has been imposed upon the Commission too vaguely and obscurely to be enforced by a mandamus."

II

The decision of the Commission made in the exercise of its judgment and discretion in a matter committed to it by Congress is impregnable to mandamus

The precise question under this head is not whether the decision of the Commission is right or wrong, but whether it was made in the exercise of judgment and discretion and not arbitrarily.

This decision turned upon the application of the law to the facts, and necessarily required the interpretation and construction of the Interstate Commerce Act, the particular provisions of which have already been alluded to. There is no substantial, if any, dispute as to the correctness of the facts found by the Commission.

Now it is settled that the construction and interpretation of a statute is a judicial and not a ministerial function. *Riverside Oil Co.* v. *Hitchcock*, 190 U.S. 316; *Ness* v. *Fisher*, 223 U.S. 683; *Alaska Smokeless Coal Co.* v. *Lane*, 250 U.S. 549.

In *Hall* v. *Payne*, 254 U.S. 343, a mandamus case, the Court, speaking of the Act there in question and the Secretary of the Interior's construction of it, said (p. 347):

> * * * He could not administer or apply the act without construing it, and its con-

struction involved the exercise of judgment and discretion. * * *.

Since the Commission was called upon to construe the law in the determination of the issues raised in the proceeding and thus required to exercise its judgment and discretion, its action resulting therefrom cannot be reviewed in a proceeding in mandamus. This rule is well settled. It was stated in *Ness* v. *Fisher*, 223 U.S. 683, wherein the Court refused to review a construction placed upon an act by the Secretary of the Interior, thus (p. 691):

> So, at the outset we are confronted with the question, not whether the decision of the Secretary was right or wrong, but whether a decision of that officer, made in the discharge of a duty imposed by law and involving the exercise of judgment and discretion, may be reviewed by mandamus and he be compelled to retract it, and to give effect to another not his own and not having his approval. The question is not new, but has been often considered by this court and uniformly answered in the negative. *Decatur* v. *Paulding*, 14 Pet. 497, 515; *United States ex rel. Tucker* v. *Seaman*; 17 How. 225, 230; *Gaines* v. *Thompson*, 7 Wall. 347; *Litchfield* v. *Register and Receiver*, 9 Wall. 575; *United States ex rel. McBride* v. *Schurz*, 102 U.S. 378; *United States ex rel. Dunlap* v. *Black*, 128 U.S. 40, 48; *Riverside Oil Co.* v. *Hitchcock*, 190 U.S. 316, 324. * * *.

In *Alaska Smokeless Coal Co.* v. *Lane*, 250 U.S. 549, 555, it was said:

> * * * where there is discretion * * * even though its conclusion be disputable, it is impregnable to mandamus.

In *Hall* v. *Payne*, 254 U.S. 343, speaking of the Act there in question and the Secretary's construction of it, it was said (p. 348):

> * * *. The view for which the relator contends was not so obviously and certainly right as to make it plainly the duty of the Secretary to give effect to it. The relator, therefore, is not entitled to a writ of mandamus. * * *.

To the same effect are *Knight* v. *Lane*, 228 U.S. 6; *Int. Com. Comm.* v. *Waste Merchants Assn.*, 260 U.S. 32; *Work* v. *Rives*, 267 U.S. 175.

Two recent cases may also be cited. In *Interstate Commerce Commission* v. *Campbell*, 289 U.S. 385, mandamus was sought to compel the Commission to make an award of damages in a case wherein the Commission had found discrimination against relator and ordered it removed; damages were not awarded because the Commission found and declared that "the record would not support an award of damages." It was asserted that under the facts stated in the Commission's report it was clear that damages had been sustained and that denial of them was an abuse of discretion and a breach of a ministerial duty, and an arbitrary with-

holding. Holding that mandamus would not lie, this Court said (pp. 393, 394):

> * * * Errors of law in the discharge of a function essentially judicial are not subject to be corrected through the writ of mandamus any more than errors of fact. If the Commission had declined to listen to the claim for reparation, or finding reparation due had declined to order payment, mandamus might have been available to hold it to its duty. That is not what happened. The Commission heard the complaint and proceeded to a decision. If the mandamus were to stand, the result would not be to compel the Commission to adjudicate the cause, for that it has already done; the result would be to compel an adjudication in a particular way. The rule is elementary that this is not the function of the writ. Mandamus is an appropriate remedy to compel a judicial officer to act. It may not be used as a substitute for an appeal or writ of error to dictate the manner of his action. *Interstate Commerce Commission* v. *Waste Merchants Assn.*, 260 U.S. 32, 34; *Wilbur* v. *Kadrie*, 281 U.S. 206, 218; *Interstate Commerce Commission* v. *N.Y., N.H. & H. R.R. Co.*, 287 U.S. 178, 204.
>
> The policy of the law has been to give finality to orders of the Commission negative in form and substance, and to keep them out of the courts. *Standard Oil Co.* v. *United States, supra; Alton R.R. Co.* v. *United States, supra; Procter & Gamble Co.* v. *United States, supra; B. & O. R.R.*

Co. v. *Brady, supra.* A dissatisfied complainant is not permitted to escape these limitations indirectly by broadening the functions of mandamus when he is barred from more direct review. *I.C.C.* v. *Waste Merchants Ass'n, supra,* p. 35. * * *.

And in *Butte, Anaconda & Pac. Ry. Co.* v. *United States, supra* (290 U.S. 127, 142), it was said:

> * * * Though it were charged that the Commission erred in so dismissing the claim, the carrier could not by mandamus compel it to proceed with the enquiry. See *Abilene & Southern Ry. Co.* v. *Interstate Commerce Commission,* 8 F. (2d) 901; *Cripple Creek & Colorado Springs R.R. Co.* v. *Interstate Commerce Commission,* 11 F. (2d) 554; *Empire & S.E. Ry. Co.* v. *Interstate Commerce Commission,* 45 F. (2d) 292; *Interstate Commerce Commission* v. *Arcata & Mad River R.R. Co.,* 65 F (2d) 180. Compare *Interstate Commerce Commission* v. *Humboldt Steamship Co.,* 224 U.S. 474; *Louisville Cement Co.* v. *Interstate Commerce Commission,* 246 U.S. 638.

The opinion of the Court of Appeals of the District is very clear in its discussion of this phase of the case. The Court said:

> The Commission, we think, share this view, and it is clear would have revised the contract accordingly if they could have interpreted the statutes broadly enough to justify such action. But appellants tell us

that the statute is broad enough and that, in the view they are entitled to take, the refusal of the Commission to grant the relief is not grounded on a misinterpretation of the statute, but is in every respect a denial of jurisdiction. In support of this they quote from the opinion certain statements to the effect that "the power and authority thus invoked are not conferred by the quoted paragraph [the statute]", and again, "we are unable to find the requisite power or authority in any other provision of the act", and "we are unable to spell out from that provision such a jurisdiction." These statements they say indicate the view of the Commission that it was without jurisdiction. But we think the appellants' position in this respect is grounded upon a mistaken theory. It is not a lack of jurisdiction to hear and decide that the Commission refers to but a lack of legislative authority to do the particular thing appellants ask. The Commission is an administrative body and can exercise only the powers delegated to it by Congress, but in the application and interpretation of the powers conferred it exercises judgment and discretion, and it was clearly in the exercise of these that it used the language in the quoted sentences above. If the Commission has the power in this instance to change the contract, it got it only by statute, and it was by looking to the statute and its limitations that the Commission reached its negative conclusion. And we may remark in passing that to jus-

tify the Commission in the exercise of such authority as is asked, the right to do so should be expressed in clear and certain language. Congress has conferred on the Commission broad powers for the purpose of avoiding discriminations, preferences, and inequalities, and has likewise given it power to regulate the interchange of traffic and the distribution of cars, to revise extortionate exactions under trackage agreements, to enforce the use by one carrier of the terminal facilities of another, and indeed to take all necessary steps to maintain an adequate railway service, but it is going too far to say that all or any of these powers of themselves justify the abrogation or annulment of a valid contract between carriers in the use of terminal facilities because in its subsequent carrying out inequalities are shown to exist. The case is, of course, different if the contract either then or subsequently violates a specific law of the United States. Cf. *L. & N. R.R.* v. *Mottley*, 219 U.S. 467. In cases in which it does not, it may well be that only the most pressing public necessity would justify the Congress in delegating to an administrative body jurisdiction to destroy a valid contract and substitute another of its own making, and the Commission would not be justified in assuming Congress had done so except when the authority was clear, for the inviolability of contracts is a cardinal principle of our business and social life.

> The States are forbidden to pass any law impairing them, and as far back as the ordinances for the government of the Northwest Territory it was stated as a primary principle that in the just preservation of rights and property, it is understood and declared that no law ought ever to be made, or have force, that shall in any manner whatever interfere with or affect private contracts or engagements bona fide, without fraud, previously made. This is no more than the recognition of a fundamental principle, as true now as then, that contracts, as vesting rights of property, ought to be protected from interfering legislation. (R. 253–255.)

Under the authorities it is certain that there was no warrant for the issuance of the writ applied for by petitioners.

III

The decision of the Commission was not arbitrary; it was a reasonable construction of the provisions of the statute, indeed a correct one

We might well rest the case upon the points already discussed, but we think it well to consider the provisions of the statute to show the reasonableness, indeed the correctness, of the Commission's construction of them.

First, as to paragraph (4) of Section 3. That paragraph provides:

> If the Commission finds it to be in the public interest and to be practicable, with-

out substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any carrier, by another carrier or other carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be.

The very language shows that the power which the statute imposed on the Commission was a compulsive power upon an unwilling terminal owner to allow use of the terminal by another carrier, who desired but could not otherwise obtain use of the facilities.

The provisions for compensation and the methods which are prescribed for fixing it all indicate that the allowance of the use by the owning carrier is involuntary. This is emphasized by the assimilation of the procedure in condemnation cases to the determination of compensation when the parties cannot agree on that matter, or are dissatisfied with the Commission's determination of the amount of compensation.

Plainly the proceeding contemplated is adversary in character and does not relate to a voluntary arrangement between the carriers.

The petitioners are not in such situation as to be entitled to the relief which they sought of the Commission. They are already using the terminal facilities, they have a contract or agreement voluntarily entered into years ago by which their right to occupy and use the terminal facilities was secured and by which they assumed obligations in consideration for the right so secured. Further, they, as pointed out by the Commission, are in the status of proprietors of the facilities, along with the ten other "proprietary companies." Thus, upon the facts, they did not bring themselves within Section 3 (4).

The Commission has construed this paragraph as applying to involuntary allowance of use. In *Hastings Commercial Club* v. *Chicago, M. & St. P. Ry. Co.*, 69 I.C.C. 489 (decided July 10, 1922), it said (p. 493):

> Prior to its amendment by the transportation act, 1920, that part of section 3 which relates to the interchange of traffic between connecting carriers specifically provided that it should not be construed as requiring any common carrier to give the use of its "tracks or terminal facilities" to another carrier engaged in like business. As amended by the transportation act this provision of the law gives us a direct and explicit power to require the use by one carrier of the "terminal facilities" of another carrier upon certain conditions. It is apparent that the policy of Congress was thus reversed. Where it had formerly safeguarded the carrier in the exclusive use of its terminals, it now recognized that there is a broader interest than that of the individual carrier whose property rights happened to be involved, viz, that of the public. The object of the statute was to make more flexible the use of existing terminal facilities, and while the power thus granted to us is to be exercised upon careful consideration of each situation, it is but an extension of the general principle that in many instances, and from the very nature of the business of a common carrier, the interest of the public

imposes important qualifications on the manner of use of the property employed in the carrier service.

In *Long Island R.R. Co. Trackage,* 162 I.C.C. 218, the Long Island and the Pennsylvania had entered into an agreement for trackage rights into and use of the Pennsylvania's station at New York City by the Long Island. A certificate of public convenience and necessity for such operation, under Section 1 (18) of the Interstate Commerce Act was applied for and also an order of the Commission, under Section 3 (4), requiring the use of the tracks and facilities upon the terms already agreed to by the parties. The Commission dismissed the application under Section 3 (4), saying (p. 220):

> * * * As to section 3 (4), which provides for the compulsory opening of one carrier's terminal facilities to another carrier when the public interest requires such use, there is nothing in the situation here presented which brings it within the terms of that paragraph. By voluntary arrangements between the parties the Long Island has been using the tunnel, yard, and terminal facilities provided for it by the Pennsylvania in New York since September 8, 1910. There is no suggestion that the Pennsylvania intends to discontinue this privilege. The question of compensation is indeed at issue, but contrary to the applicants' understanding of the force of this fact, associated as it is with the close corporate relationship between the companies, the applicability of sec-

> tion 3 (4) does not appear. Accordingly, the fixing of compensation as therein provided on the principle controlling compensation in condemnation proceedings, may be disregarded. That part of the application which is under section 3 (4) will therefore be dismissed. * * *.

As finally authoritative, we cite *Railroad Commission* v. *Southern Pac. Co.*, 264 U.S. 331, which involved the Los Angeles Union Passenger Station project. Speaking of several provisions of the Transportation Act, 1920, it was said (pp. 343, 344):

> * * * It not only provides for the temporary expropriation of terminals and main track of one railway to the common use of one or more other railways in an emergency, but it also contemplates the compulsory sharing of one company's terminals with one or more companies as a permanent arrangement. This is a drastic limitation of a carrier's control and use of its own property in order to secure convenience and dispatch for the whole shipping and traveling public in interstate commerce. It gives to the Interstate Commerce Commission the power and duty, where the public interest requires, to make out of what is the passenger and freight station of one interstate carrier, a union station or depot.

A reference to the legislative history of the bill which became the Transportation Act shows that Congress was providing for *compulsory* sharing

of terminal facilities. In House Report No. 456, 66th Congress, 1st Session, it was said of this provision:

> Under section 405 the commission may require the terminals of any carrier to be open to the traffic of other carriers upon such just and reasonable terms and conditions, including just compensation to the owners thereof, as the commission, after full hearing, upon complaint or upon its own initiative, may by order prescribe. The advantages of joint use of terminals have been fully demonstrated under Federal control, and it is to preserve these advantages that the above power has been granted to the commission in this bill. While the question of compensation may present some difficulties, these can be overcome. The right of the individual carrier to the exclusive use of its own property should be made to yield to the superior right of the public. In these days, when the cost of terminals in the larger cities is almost prohibitive, the joint use of terminals under regulations prescribed by the commission will result in large economies in operation, and in many instances add to the convenience of the public.

And in House Report No. 650, 66th Congress, 2nd Session, it was said:

> Section 405 of the House bill provided that the commission might require the terminal of any carrier to be open to the traffic of other carriers upon such terms and for such compensation as the commission might pre-

scribe. The Senate amendment, in section 11, provided that the transportation board might require one carrier to permit another carrier to use its "terminal, or other facilities including main-line track or tracks for a reasonable distance outside of such terminals," on such terms as the carriers might agree on or as the board might fix. Section 405 of the conference bill contains provisions on this subject similar to those in the Senate amendment. It is provided that the commission, if it is found to be in the public interest and practicable, may require one carrier to allow another to use its terminal facilities "including main-line track or tracks for a reasonable distance outside of such terminal," on such terms as the carriers may agree upon, or as the commission may fix, subject to the right, however, of the carrier whose terminal facilities are thus thrown open to sue for any damages sustained, or any compensation owed.

Respecting Section 15a, the Commission's conclusion that the case did not come within its purview is so patently correct that we need not labor the point, the statement in the report being amply sufficient to dispose of it. We quote (R. 115, 116, 104 I.C.C. at pp. 223, 224):

> Certain of the interveners cite the provision of Section 15a of the act, that we shall initiate, modify, establish, or adjust reasonable rates so that the carriers of the country, as a whole or by groups, will, under honest, efficient, and economical management and

reasonable expenditures for maintenance of way, structures, and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of their railway property held for and used in the service of transportation. They contend that, giving effect to the policy reflected in that provision and without waiting until a carrier's bankruptcy shall ensue, we need only find as a fact that the operating agreement, improvidently entered into, is so burdensome to them as to result in inefficient and uneconomical operation of their railways, to cause misapplication by them of funds created for an entirely different purpose, and generally to operate to impair their ability to furnish adequate railway service, and our jurisdiction for the purpose of the desired relief will at once attach. However desirable it might be in particular instances, we are unable to spell out from that provision such a jurisdiction. What the provision requires or authorizes us to do is to fix remunerative reasonable rates in circumstances which embrace honest, efficient, and economical management as a condition or limitation. We should have the information in that respect which will aid an effective exercise of our duty and authority, but we are not commanded to insure or empowered to enforce such management, responsibility for which at all times rests upon the carriers. Neither expressly nor by implication does the provi-

> sion embrace a direct or indirect revision or reformation of any such contract, lawful in itself as far as appears, as that here in question; and we are unable to find the requisite power or authority in any other provision of the act.[3]

The basis for the claim of discrimination, in support of which paragraphs (1) and (3) of Section 3 of the Act were brought forth, is that the small users of the terminal are required to sustain the same burden as the large users so far as the capital charges are concerned, one-twelfth of the interest on the bonds of the Terminal Company, and of the taxes and of the principal of the bonds; that that is unjust because their use of the terminal facilities is so much less than of the large lines and that if the Commission held that the Missouri-Kansas-Texas Railroad was entitled to an order under paragraph (4) of Section 3 and thus was relieved of any obligations as a proprietary company, the burden and discrimination would be

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[3] The rule of rate-making laid down in Section 15a (2) was changed by the amendment of that provision contained in the Act of June 16, 1933, 48 Stat. 220, which requires the Commission to "give due consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service." See *Florida* v. *United States*, 292 U.S. 1, 5–7.

greater since the remaining eleven proprietary companies would have to assume an equal share of the one-twelfth interest of the former Missouri, Kansas & Texas Railway's interest.

Paragraphs (1) and (3) of the section are as follows:

> (1) That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.
>
> (3) All carriers, engaged in the transportation of passengers or property, subject to the provisions of this Act, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper.

The Commission, in considering this claim of discrimination, said (R. 116, 104 I.C.C. at p. 224):

> Paragraphs (1) and (3) of section 3 are put forward as vitiating the operating agreement in so far as it provides for the equal division of interest and taxes. Paragraph (1) prohibits any undue prejudice or preference as between particular persons, companies, firms, corporations, or localities, or particular descriptions of traffic, in any respect whatsoever, chargeable to any common carrier or carriers subject to the act. Paragraph (3) commands the maintenance of appropriate facilities for the interchange of traffic between carriers, and for the receipt, forwarding and delivery of passengers and property, without discriminations in rates, fares, and charges or in the distribution of unrouted traffic between their connections. Assuming, without now deciding, that the provisions of paragraph (1) are broad enough to embrace, as between the parties thereto, a joint terminal agreement into which all the lines have voluntarily entered and for which they are mutually responsible, the distribution of the charges here in question is not shown to fall within their condemnation. Those charges are distinctly capital charges, based upon the terminal property itself, not upon its use, in no sense assumed by or chargeable to the proprietary lines as compensation for uses they either do or may make, and are divided among the lines in the proportions of their equitable

titles to or interests in the property. For their respective uses of the property the lines severally assume maintenance and operating expenses in corresponding proportions. This is not shown to be undue prejudice or preference or unjust discrimination. Each proprietary pays an equal share of the aggregate interest and taxes upon its equal share in the aggregate property. Also, as essentially capital charges, they have no relation, direct or indirect, to the interchange of traffic between the several lines within the contemplation of paragraph (3).

We submit that this was a reasonable conclusion upon the facts presented to the Commission.

There is no preference or discrimination in either the "capital charges" or in the "user charges." As to the former, the railroad companies are on an *exact equality;* each is obligated to pay one twelfth of the "fixed charges." As to the latter, there is no claim of discrimination or preference, nor could there be because the rate of charge is the same, the carriers paying in proportion to the use made of the facilities. Hence, there is no violation of paragraph (1) of Section 3.

It is also clear that the facts of the case do not show any violation of paragraph (3) of Section 3. There is no basis for the claim that there is any failure to furnish or afford "reasonable, proper, and equal facilities for the interchange of traffic," etc. Indeed, the operating agreement requires and provides that the use of such facilities as are avail-

able shall be furnished without discrimination. Article I, Section 3 of that instrument obligates the Terminal Company to "furnish motive power, switch, move and handle the passengers of the Railway Companies, * * * upon or over the Terminal Facilities or any part thereof, without preference or discrimination * * *." By Section 4 of that Article the Terminal Company gives and grants to each of the railway companies "the right and privilege, * * * of running its freight trains, drawn by its own motive power and manned by its own crews, upon and over said Terminal Facilities or any part thereof * * *." By Section 5 of the same Article, the Terminal Company agrees that it will "for all internal movements thereof, furnish motive power, switch, move and handle the freight cars of the Railway Companies, respectively, as herein provided, upon or over the Terminal Facilities, or any part thereof, without preference or discrimination, for which service charges shall be made by the Terminal Company at such rates as may be established by it from time to time." (R. 22, 23.)

In Article III, Section 1, it is provided that the Terminal Company "shall establish rules and regulations governing the operation of trains within and upon the Terminal Facilities *and the use* and *enjoyment* thereof in all other respects; provided, always, that such rules and regulations shall be fair and equitable and shall apply *equally* and *without discrimination* to all the Railway Com-

panies using the Terminal Facilities * * *." (Italics supplied.) (R. 36.)

In view of these provisions it cannot be doubted that there is no failure to "afford all reasonable, proper, and equal facilities."

So far as discrimination in rates, fares and charges between connecting lines is concerned, it may be pointed out, in addition to what has just been said, that the words "rates, fares and charges" are the same words as appear in Section 1 (4), relating to reasonableness, and Section 6, relating to filing tariffs of charges, and apply to and concern compensation for transportation services and therefore would have no application to "capital charges." Moreover, the Kansas City Terminal Company files tariffs covering its terminal switching service. (Report of Commission, R. 107, 104 I.C.C. at 215).

Now it is important to note that no breach of the terms and covenants of the operating agreement is alleged. On the contrary the burden of the complaint is that the agreement is being enforced. That the petitioners by this suit, as by the proceeding before the Commission, seek to avoid the obligations of the contract in respect of the "capital charges," will not be denied. However, this agreement which is the bone of contention between the "small users" and the "large users" of the terminal facilities, was entered into voluntarily; the only compulsion, if such it may be called, was that of the public sentiment in Kan-

sas City which was enthusiastic for a union station. There was nothing ambiguous about the terms, particularly that part which dealt with the obligations as a proprietary company; the small users must have then been aware that their use of the facilities would not be as great as that of the large users. That they found the burden greater than they had foreseen and that it has become a heavy burden, while regrettable, does not of itself entitle petitioners to relief at the hands of the Commission from the obligations of that contract.

In saying this we do not lose sight of the principle laid down in cases such as *L. & N. R.R.* v. *Mottley,* 219 U.S. 467, that contracts valid when negotiated may be abrogated by the exercise by Congress of the authority which it has under the Constitution to regulate commerce between the states, but as the Commission in its report points out, in those cases there was a definite grant of authority (R. 113, 114, 104 I.C.C. at 221, 222), or a specific enactment by which certain kinds of contracts were declared void or rendered unenforceable.

These companies, parties to the agreement, in effect became partners in the enterprise and to assure the consummation of it, agreed to assume an equal share of what may be called the fixed charges. It is difficult to see where discrimination exists in such a situation, especially discrimination under the Act. Whether the alleged inequality created

by, or existing under, the contract was a discrimination, was a matter particularly for the judgment of the Commission, for it is well settled that what constitutes unreasonable or unjust discrimination is a question of fact, and the determination of whether a discrimination is unjust or unreasonable is ordinarily left to the Commission, whose finding is conclusive, when supported by substantial evidence. *Texas & Pac. Ry. Co.* v. *I.C.C.*, 162 U.S. 197, 219, 220; *I.C.C.* v. *Alabama Midland Ry. Co.*, 168 U.S. 144, 170; *Manufacturers Ry. Co.* v. *United States*, 246 U.S. 457, 481; *Virginian Ry. Co.* v. *United States*, 272 U.S. 658, 663.

There is another ground upon which the Commission might properly have predicated its conclusion that a case was not presented under paragraph (1) of Section 3, instead of *assuming* for the purposes of the decision, the applicability of that paragraph. That ground is that the paragraph does not cover a discrimination between common carriers. In *Oklahoma-Arkansas Tel. Co.* v. *Southwestern Bell Telephone Co.*, 183 I.C.C. 771, the Commission, considering a complaint of alleged discrimination by one telephone company against another, said (p. 774):

> * * * It is extremely doubtful whether section 3 (1) could be interpreted as applying to a discrimination between common carriers. The cases previously referred to had to do with prejudice and preference between shippers. In *Delaware, L. & W. R.*

> *Co.* v. *Kutter,* 147 Fed. 51, the Circuit Court of Appeals, Second Circuit, referring to this provision of the law, said: "The wrong prohibited by the section is a discrimination between shippers." Certiorari was denied by the Supreme Court, 203 U.S. 588. The legislative history of this paragraph of section 3 appears to support the view that discrimination between shippers was the only thing aimed at. If this were not so, the provisions of section 3(3), which specifically prohibited discrimination between carriers of passengers or property, would seem to be superfluous. We are constrained to hold, therefore, that a situation of prejudice or preference between common carriers is not comprehended by the provisions of section 3(1).

We submit that the Commission's decision was not only reasonable, but indeed correct.

The order which is sought to be set aside was entered November 10, 1925, nearly eight years before this suit was filed; the petitions for rehearing were not filed until 1931, more than two years prior to the filing of the suit.

We call attention to the fact that a considerable amount of the bonds of the Kansas City Terminal Company was sold after the order of the Commission of November 10, 1925. (R. 240.) It may fairly be inferred that they were purchased on the faith of the Commission's decision and order and that the bondholders would be prejudiced if the constituent carriers were to have the privilege of

withdrawing from their obligations in respect of the "capital charges", and prejudice would likewise result to the Kansas City Terminal Company. Furthermore, the Commission had held, under Section 3 (4), the Missouri-Kansas-Texas entitled to use of the terminal facilities and had continued the case for the purpose of determining the compensation which should be paid for that use. Such hearing and decision has been had. (198 I.C.C. 4.) If petitioners were successful in this suit, then the Commission would be under the necessity of a new hearing to determine the compensation which should be exacted of them, whereas had the suit been seasonably filed and had resulted favorably, the question of compensation could have been passed upon at one time and hearing as to all who desired to withdraw from the operating agreement.

CONCLUSION

It is respectfully submitted that the decision of the United States Court of Appeals for the District of Columbia, sustaining the action of the trial court in dismissing the petition for a writ of mandamus, was correct and should be affirmed.

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SEPTEMBER, 1934.

APPENDIX

The Statutes Involved

The pertinent provisions of the applicable law are the following sections of the Interstate Commerce Act, U.S. Code, Title 49, c. 1:

Section 1 (15):

> Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people upon such terms of compensation as between the carriers as they may agree upon, or in

the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them. In time of war or threatened war the President may certify to the Commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the Commission shall, under the power herein conferred, direct that such preference or priority be afforded.

Section 3 (1):

That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Section 3 (3):

All carriers, engaged in the transportation of passengers or property, subject to the provisions of this Act, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper.

Section 3 (4):

If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any carrier, by another carrier or other carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier

whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be.

Section 15a (2):

In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided,* That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

Section 15a (2), as amended by Transportation Act, 1933:

In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other

factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service.

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